IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES L. MARTIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N17C-08-152 CEB
	)	
DAVID H. NIXON,	)	
	)	
Defendant.	)	

ORDER

Submitted: February 23, 2022
Decided: April 13, 2022

Upon Consideration of Plaintiff's Motion for Rule to Show Cause,
DENIED.

Upon Consideration of Plaintiff's Motion for Judgment as a Matter of Law; or to Alter or Amend Judgment; or for a New Trial,
DENIED.

Upon Consideration of Plaintiff's Motion for Taxation of Costs,
GRANTED IN PART and DENIED IN PART.

James L. Martin, Wilmington, Delaware. *Pro se Plaintiff*.

Edward F. Kafader, Esquire, FERRY JOSEPH, P.A., Wilmington, Delaware. *Attorney for Defendant David H. Nixon*.

BUTLER, R.J.

This will be the Court's consolidated ruling on Plaintiff's blast of post-trial motions that launch from his successful verdict after a bifurcated proceeding in which Defendant first was found at fault and then found liable for damages. The Court assumes the parties' familiarity with the motions.

BACKGROUND

1. Plaintiff's trial was bifurcated when, despite the case scheduling order and numerous exhortations to move forward, Plaintiff failed to secure expert testimony on damages. A stipulation on damages had been agreed to by the attorneys, but Plaintiff's counsel passed away before it was entered. Plaintiff—a non-practicing attorney who appeared *pro se*—repudiated the stipulation and the case (after more delays) proceeded to trial. The liability trial resulted in a finding that Defendant was 57% responsible when Plaintiff struck Defendant's vehicle while Plaintiff was riding his bicycle. The second, COVID-delayed portion of the trial on damages resulted in a verdict for the Plaintiff. After adjustment for comparative negligence, the award was reduced to $56,544.47, plus costs.

2. Almost immediately thereafter, Plaintiff filed three post-trial motions that seek varied and disjointed relief: (1) a motion for a Rule to Show Cause; (2) a combined motion for judgment as a matter of law (called a "renewed" request), to alter or amend judgment, or for a new trial; and (3) a motion for taxation of costs.

ANALYSIS

A. Plaintiff's motion for a rule to show cause is denied.

3. The Court denies Plaintiff's motion "for a Rule to Show Cause" directed at (i) the Court's Chief Security Officer and (ii) the vice president of a court reporting company located in Portland, Oregon. The first concerns Plaintiff's poor planning in orienting himself with the Court's technology. These concerns were mooted when Plaintiff did not obtain a digital copy of his expert's deposition testimony. The second seeks relief because of some miscommunications with the court reporting company about the trial deposition of his expert witness, which was taken just a week before trial.

4. Each of these problems was brought on by Plaintiff's failure to secure expert testimony for trial until the last minute, despite being admonished by the Court on numerous occasions that expert testimony would be essential to proving damages. Plaintiff's dithering caused many unnecessary difficulties with the resolution of this case. The Court will not entertain sanctions against unnamed parties.[1] While much more could be said, we will spare the reader further discussion in favor of dealing with business that happened and can be dealt with and pass on those things that might have been, but never were.

[1] *See In re Rinehardt*, 575 A.2d 1079, 1082–83 (Del. 1990).

B. Plaintiff's combined motion is denied.

5. The Court also denies Plaintiff's "renewed" motion for judgment as a matter of law and "motion to alter or amend judgment" or for a new trial. These motions—renewed or otherwise—are utterly lacking in merit and (untimely) seek reargument[2] of issues already ruled upon numerous times. Repeating the Court's rulings yet again would not be helpful or appropriate.[3]

C. Plaintiff's motion for taxation of costs is granted in part and denied in part.

6. The Court last addresses Plaintiff's costs motion. The motion is itemized by the type of expense Plaintiff believes is recoverable. But many of these expenses are not "costs" as that term is used in Rule 54. Accordingly, the Court will focus on those classes of expenses for which costs generally are recoverable, and subject to the Court's discretion, allow, reduce, or disallow them.

7. Civil Rule 54 entitles the prevailing party to its costs "*unless* the Court otherwise directs."[4] The "otherwise directs" exception confers "discretion" on the

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[2] *See, e.g.*, *Nicholson v. Sullivan*, 1993 WL 542297, at *1 (Del. Dec. 6, 1993) (explaining that a post-trial motion's "label" is not dispositive if the motion's merits relate to a subject more appropriately raised for reargument under Rule 59(e)).

[3] *See, e.g.*, *State v. Ackridge*, 2021 WL 753445, at *2 (Del. Super. Ct. Feb. 25, 2021) (summarizing applicable reargument principles, including that "a motion for reargument . . . is not intended to rehash arguments already decided by the court" (internal quotation marks omitted)).

[4] Del. Super. Ct. Civ. R. 54(d) (emphasis added).

Court to determine appropriate costs.[5] By consequence, "there may be circumstances under which costs do not go to the party to whom a final judgment is awarded."[6]

8. There also may be circumstances under which it is appropriate to reduce costs to account for the prevailing party's own liability (*i.e.*, its "partial success").[7] Indeed, reducing costs may be "particularly" appropriate in "comparative negligence" cases, especially if the parties' percentages of fault are "so close."[8] "[T]here are occasions when it is right, and just and fair" to require a prevailing party to bear its own costs or to grant fewer costs than the prevailing party requested.[9]

9. Against this background, and applying the specific, item-based provisions in Rule 54, the Court will take each requested cost in turn.

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[5] *E.g.*, *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722–23 (Del. 1976); *accord Sliwinski v. Duncan*, 1992 WL 21132, at *2 (Del. Jan. 15, 1992).
[6] *Donovan*, 358 A.2d at 722. *See, e.g.*, *Mosley v. Milner*, 1999 WL 463550, at *1 (Del. Super. Ct. Apr. 8, 1999) (denying defendant costs because costs need not be "automatically determined by the verdict").
[7] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 185 (Del. Ch. 2003). *See, e.g.*, *Mulford v. Haas*, 2001 WL 541023, at *4–5 (Del. Super. Ct. Apr. 25, 2001); *Welsh v. Del. Clinical & Lab. Physicians, P.A.*, 2001 WL 392400, at *4 (Del. Super. Ct. Mar. 19, 2001). *See also Dreisbach v. Walton*, 2014 WL 5426868, at *5 (Del. Super. Ct. Oct. 27, 2014) (observing that costs claimed must be "reasonable").
[8] *Turner v. Mehrtens*, 1999 WL 459222, at *1 (Del. Super. Ct. June 9, 1999). *E.g.*, *Johnson v. McCaffery*, 2013 WL 3422600, at *1–2 (Del. Super. Ct. June 11, 2013) (denying motion for costs where liability was 50-50); *Nelson v. Feldman*, 2011 WL 531946, at *1–2 (Del. Super. Ct. Jan. 26, 2011) (same where liability was 51-49).
[9] *Mosley*, 1999 WL 463550, at *1 (internal quotation marks omitted).

I. Filing and Discovery Fees

10. The Court will allow service and filing fees of $335.75. The costs of obtaining records from health care providers and making photocopies in discovery will not be allowed.[10]

II. Mediation and Trial Fees

11. The trial fee of $150 will be allowed. The mediation fee will not.[11]

III. Expert Fees

a. Dr. Getz

12. The fee for written expert reports of Dr. Getz, provided in routine discovery, is not allowed.[12] A fee for Dr. Getz's record review is not allowed.[13] While a video record of the deposition was made, it was not played to the jury and so those expenses will not be allowed.[14]

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[10] *See, e.g.*, *Servino v. Med. Ctr. of Del., Inc.*, 1997 WL 527961, at *1 (Del. Super. Ct. Aug. 12, 1997) (denying costs for discovery records, including for making copies); *see also Kellner v. Interlake (Can.) Realty Corp.*, 1982 WL 17860, at *3 (Del. Ch. June 6, 1982) (denying discovery costs where defendants "protract[ed] discovery" and made the case "complicated" without good reason); *cf. DIGA v. Troise*, 1992 WL 240352, at *1 (Del. Super. Ct. Sept. 14, 1992) (denying costs for an unsolicited medical exam).

[11] *See Cooke v. Murphy*, 2013 WL 6916941, at *6 (Del. Super. Ct. Nov. 26, 2013) (observing that awarding mediation fees is a discretionary decision).

[12] *See Payne v. Home Depot*, 2009 WL 659073, at *8 (Del. Super. Ct. Mar. 12, 2009); *Spencer v. Wal–Mart Stores E., LP*, 2007 WL 4577579, at *1 (Del. Super. Ct. Dec. 5, 2007).

[13] *See Bowman v. Dobraski*, 2018 WL 3459250, at *1 (Del. Super. Ct. July 17, 2018).

[14] *E.g.*, Del. Super. Ct. Civ. R. 54(f) ("The production and playback costs associated with any videotape deposition may also be taxable as costs *if the video deposition is*

13. Dr. Getz did not testify at trial, but his deposition transcript was read to the jury. The cost of the written transcript—$490—is recoverable.[15]

14. Dr. Getz charged a fee of $6,000 for a one-hour trial deposition. "When determining an appropriate fee to award medical experts, this Court frequently utilizes guidance provided by the Medico-Legal Affairs Committee of the Medical Society of Delaware."[16] In 2006, the Committee recommended "an appropriate fee range for a deposition lasting up to two hours [from] $ 1,000 [to] $2,000."[17] Applying the Social Security Administration's cost of living adjustments since 2006 suggests an increase in cost of living of 30.5%.[18] Here, an expert fee of $1,300 will be allowed.[19]

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introduced into evidence." (emphasis added)); *Martin v. Nat'l Gen. Assurance Co.*, 2014 WL 5659411, at *1 (Del. Super. Ct. Nov. 3, 2014); *Foley v. Elkton Plaza Assocs., LLC*, 2007 WL 959521, at *3 (Del. Super. Ct. Mar. 30, 2007); *Banks v. J&N Hickman Fam. Ltd. P'ship*, 2006 WL 240641, at *2 (Del. Super. Ct. Jan. 11, 2006); *Tolson v. Chormon*, 2005 WL 1953039, at *2 (Del. Super. Ct. July 5, 2005); *Mulford*, 2001 WL 541023, at *5.

[15] *E.g.*, Del. Super. Ct. Civ. R. 54(f); *Nygaard v. Lucchesi*, 654 A.2d 410, 413 (Del. Super. Ct. 1994).

[16] *Bishop v. Progressive Direct Ins. Co.*, 2019 WL 2009331, at *3 (Del. Super. Ct. May 3, 2019) (internal quotation marks omitted).

[17] *Henry v. State Farm Mut. Auto. Ins. Co.*, 2017 WL 4271205, at *5 (Del. Super. Ct. Sept. 25, 2017) (internal quotation marks omitted).

[18] *Cost-of-Living Adjustment (COLA) Information for 2022*, Soc. Sec. Admin., https://www.ssa.gov/cola/ (last visited Apr. 11, 2022) (calculating a 4.1% increase in 2006 and a 5.9% increase in 2022, equating to a 1.8% differential over 16 years).

[19] *See* 10 *Del. C.* § 8906 (1998) (granting the Court discretion to fix expert fees); Del. Super. Ct. Civ. R. 54(h) (incorporating Section 8906).

b. The "Bicycle Expert"

15. Plaintiff also hired a "bicycle expert," who was deposed. That expert did not testify and his deposition was not used. These expenses are not recoverable.[20]

IV. Attorney's Fees

16. Plaintiff advises that he incurred $10,000 in legal fees before the death of his prior attorney. Attorney's fees are not recoverable as "costs" under Rule 54.[21]

V. Separate Case Fees

17. Plaintiff was charged with a traffic violation as a result of the accident. He hired a lawyer, went to court, brought his own court reporter, and paid for transcripts of the proceedings.[22] As explained, attorney's fees and transcripts not introduced into evidence are not recoverable. So these expenses are not allowed.

VI. Technology Fees

18. Finally, the cost of a laptop computer to integrate with courtroom technology is not recoverable, as no outside technology was used at trial.

Accordingly, Plaintiff is entitled to $2,275.75 from Defendant in costs.

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[20] Del. Super. Ct. Civ. R. 54(f)–(h).

[21] *E.g.*, *Council of Unit Owners of Windswept Condo. Ass'n v. Schumm*, 2014 WL 2528657, at *2 (Del. Super. Ct. May 19, 2014); *see* Del. Super. Ct. Civ. R. 54(i) ("No appearance fees for attorneys will be permitted or taxed as costs in any action or cause in the Superior Court.").

[22] It is not clear what proceedings were held as the charges were dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff's motions for a rule a to show cause, for judgment as a matter of law, to alter or amend judgment, and for a new trial, are **DENIED**. Plaintiff's motion for taxation of costs is **GRANTED** at an amount of $2,275.75 and **DENIED** as to any additional amounts.

IT IS SO ORDERED.

Charles E. Butler, Resident Judge